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Change of Limitation in Height of Buildings  
in Copley Square

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EDMUND A. WHITMAN

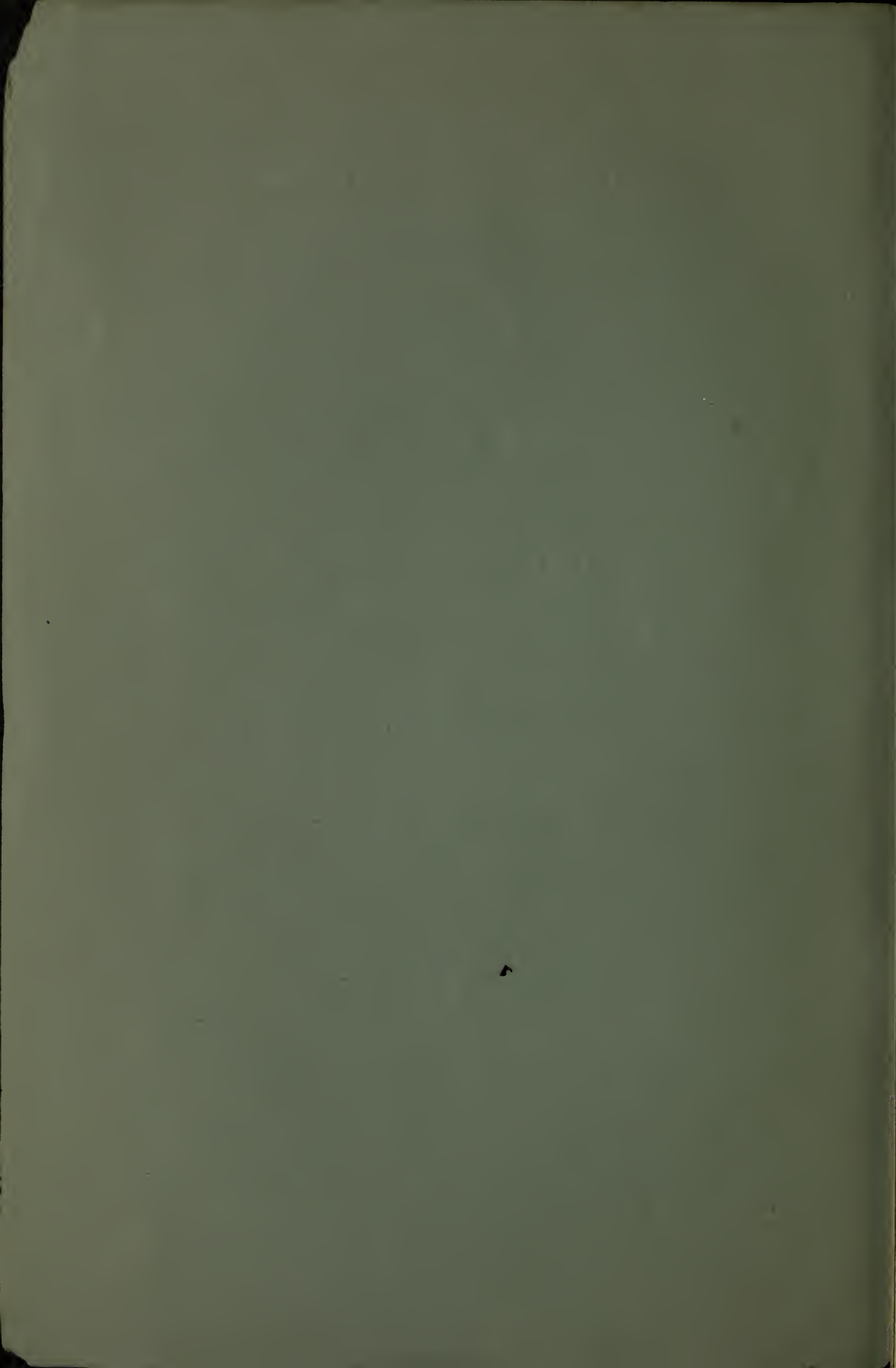
Before the

JOINT COMMITTEE ON CITIES

In Opening the Case for the Remonstrants Against the Bills  
for the Change in the Limitation in Height of  
Buildings in Copley Square  
March 2, 1903

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The Fort Hill Press  
SAMUEL USHER  
176 TO 184 HIGH STREET  
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## ADDRESS OF EDMUND A. WHITMAN.

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*Mr. Chairman and Gentlemen :*

Before calling upon the gentlemen who desire to speak in remonstrance against the passage of the proposed acts for changing the limitation of the height of buildings in Copley Square, it may be useful to give you a brief history of this whole Westminster Chambers affair, as there are only two members of your committee who have been members of this committee in past years when the matter has been discussed, and you may, therefore, be interested to hear what are the facts in connection with this somewhat remarkable case.

The original scheme for the Westminster Chambers seems to have originated with a Mr. Cregier, a Chicago architect, and with Mr. Arthur, a Boston promoter. These two gentlemen seemed to have prepared an attractive plan, not only for the building, but for its construction, without calling for any money from the interested parties, and they succeeded in interesting not only the owners of the land upon which the proposed building was to be put, but Messrs. Woodbury & Leighton a prominent firm of builders in Boston, and a Philadelphia concern furnishing structural iron.

The land on which the Westminster Chambers was put was at one time owned wholly by Mr. Henry Bigelow Williams, and at the time the Westminster Chambers plan was broached there were six houses upon it, three owned by Mr. or Mrs. Williams and the others by three citizens of Boston. The six lots had originally cost them about \$3.50 a foot, and were assessed in July, 1897, for \$6 a foot, the total assessment on buildings and land being \$198,300. The scheme devised for raising the money with which to buy the land and construct the proposed building, was to borrow \$500,000 on a mortgage on the property, and to raise \$500,000 more by trust stock to be sold to the public. The prospectus figured

out that this stock would pay dividends of twelve per cent per annum, and there would be, in addition, sufficient income to pay annually \$29,582 to a sinking fund toward the mortgage, so that the sinking fund with its accumulations would be sufficient to pay off the mortgage in thirteen years from its date, leaving the stockholders possessed of a million-dollar property which had cost them but half that sum.

The owners of the property conveyed it to one N. G. Green, by whom mortgages were given to savings banks amounting to \$500,000, and the property was then reconveyed, subject to those mortgages, to trustees to issue the trust stock. The owners, whose property was assessed, as has been said, for \$198,300, received in payment therefor \$365,000, \$308,400 of which was in cash raised on the mortgage, and \$56,600 in trust stock.

Then followed the most remarkable feature of the whole scheme. Messrs. Woodbury & Leighton, who had had a long and honorable career as builders in the city of Boston, departed from their previous custom of contracting only with responsible parties able to pay their bills, and in effect made a contract with themselves. They took part in the formation of a corporation without capital, which was called the Westminster Construction Company, and made their contract with this irresponsible corporation. The troubles which subsequently came upon Woodbury & Leighton have brought them the sympathy of the community, which their previous career fully justified; but I desire to point out now that these troubles came from the fact that they neglected their usual precaution, and themselves entered into, and became a part of, this speculation.

The Westminster Construction Company was formed in July, 1897, under the laws of Maine, with, as the charter states, a nominal capital of \$150,000, of which but \$300 was paid in. The list of the stockholders filed with the Secretary of State of Maine shows that of the 1,500 shares, Woodbury & Leighton took 500, the architect and promoter between them took about 500 shares, Mr. N. W. Cramp, of the Philadelphia concern, had 250 shares, and the owners took 150 shares. The promoter was made the president, Mr. Woodbury was the treasurer, and the architect, the agent of the



Philadelphia concern, and one of the land owners, constituted the Board of Directors.

The trustees of the building, Mr. Williams and Mr. Ladd, who were two landowners, thereupon made a contract with this Construction Company, having a capital of \$300, for the construction of the building for \$635,000, being the balance of the million after deducting the \$365,000 paid for the land. To meet their obligations the trustees then had the balance of the money raised on the mortgage, amounting to \$191,600, and the balance of the unissued trust stock, amounting to 4,434 shares, which, if it could be sold at par, would make up the balance of \$635,000.

The Westminster Construction Company thereupon made a contract with the Philadelphia concern for furnishing the iron framework, etc., for \$131,300, 115 shares of trust stock being taken in part payment, leaving the amount to be paid in cash \$119,800.

The Construction Company also made a contract with Woodbury & Leighton for \$398,700, they taking in part payment 300 shares of trust stock, and also made a contract with the architect for \$26,500, leaving a margin of profit to the Construction Company of \$78,500.

The Westminster Construction Company then agreed to take in part payment of its contract with the owners 3,869 shares of trust stock, thus leaving with the trustees 150 shares, which they sold for cash, and the proceeds of this sale, with the balance of the mortgage, gave them the sum of \$206,600 in cash. So far as is known, none of this trust stock was ever afterwards sold, except that Mr. Charles F. Ayer, one of the present trustees, bought from Woodbury & Leighton some time during the fall of 1899, long after the building had been fully completed, 2,000 shares, and paid par therefor, with the arrangement that such shares were to be made a *preferred* stock.

It appears, therefore, that the trustees only had about \$200,000 in cash, raised principally upon the mortgages, with which to meet their contract of \$635,000, and the builders and contractors all relied upon a sale to the public of this watered trust stock for the money with which to complete the building.

The trust agreement, the formation of the Westminster Construction Company, and the permit for the building, were all in July of 1897, a permit having been issued by the building department of Boston for the erection of a 120-foot building "provided the person conforms to the provisions and statutes relating to the construction of buildings in the City of Boston." The demolition of the houses on the land began in August, and was completed some time in September, this being the first notice to the public that a new building was contemplated. Public agitation at once began, and in September the Construction Company wrote to a prominent member of Trinity Church what Mr. Williams at the hearing termed a "foolish, silly letter," offering to stop the building at seven stories, and then sell it for \$1,085,000, and estimating that even at this price there would be a return of from eight to ten per cent on the investment, or, as an alternative proposition, offering to limit the building to seven stories, if they were paid \$75,000 a story for each of the three stories omitted. It is needless to say that Mr. Williams' characterization of this proposition was fully concurred in by the gentleman to whom it was addressed. Agitation continued, and the proposed building was vigorously discussed in the newspapers by letters from prominent citizens and by editorial remonstrance. About the middle of October, a committee was formed in response to a circular generally sent out, the first signer of which was Ex-Mayor Frederick O. Prince. On this committee were trustees of the Art Museum, Public Library, and the Institute of Technology, leading members of Trinity Church, and other well-known citizens.

It was obvious that nothing could be done until the assembling of the Legislature. When that body met on the 1st of January, 1898, the foundations of the building had then been completed at a cost of \$30,706, but none of the iron work or other material was delivered on the premises until after the Legislature had convened. A petition was promptly presented, signed by Mr. J. H. Benton, Jr., a trustee of the Public Library, and Mr. C. H. Dalton, one of the Subway commissioners, praying for a bill limiting the height of all buildings within five hundred feet of Copley Square to *eighty*



feet. This petition and accompanying bill were presented to the House of Representatives by Mr. Charles R. Saunders on January 14, 1898, and were subsequently supported by a petition signed by more than three thousand persons from all over the Commonwealth, representing, as was stated to the committee, taxable property to the amount of seventy-five million dollars; and the real estate interests favoring this bill, including the property in or about Copley Square which was exempt from taxation, amounted to about one hundred million dollars. Petitions were presented from Fall River, Lowell, Worcester, New Bedford, Springfield, and many other important cities and towns. The Committee on Cities gave a number of hearings in February and March. The petitioners were represented by J. H. Benton, Jr., and E. W. Burdett for the Boston Public Library, Samuel J. Elder for the Art Museum and Institute of Technology, and Mr. Charles W. Bartlett for the original petitioners, all of whom were busy lawyers, but yet rendered their services gratuitously for what they considered to be the interests of the public. The remonstrants to the bill were no less ably represented. The Westminster Chambers was represented by Mr. A. E. Pillsbury, an ex-attorney-general of the Commonwealth, and for other remonstrants were Ex-Congressmen Sherman Hoar and S. Z. Bowman, and Messrs. Southard and Tower. The city of Boston was also represented through its law department. The hearings were largely attended, and the full accounts in the news papers created a widespread interest.

The reasons for the proposed limitation of height were forcibly urged upon the committee. Copley Square had a reputation all over the country as the most beautiful public square in America, the appearance of which was likely to be spoiled by the building of what one of the counsel aptly termed "a dry goods box covered with terra cotta," between two of its most impressive buildings, and the architectural effect of the entire square was to be seriously affected. In addition, so high a building would be a perpetual menace to the safety of the valuable collections of literature and art stored in the Art Museum and the Public Library should a fire break out, and was sure to impair, if not to destroy, the

light so necessary for the exhibition of the collections in the Art Museum, and would injure Trinity Church. It was also urged that the reason why so expensive a building as the Westminster Chambers would be profitable was due to the value given to its situation through the enormous expenditure of public money in and about Copley Square. Taking into consideration the gifts by the state, the city, and individuals for educational and religious institutions, it appeared that about fifteen millions of dollars had been expended in and about this square, and it was this expenditure by the public and for the public which these owners were seeking to turn to their own private benefit.

As an illustration, the owner of the land at the corner of Boylston and Dartmouth Streets bought the estate in 1873 for \$34,860, and the assessed valuation in 1898 was \$117,600, showing a profit of four hundred per cent in twenty-five years. The land on Boylston Street, facing the square, cost the owners \$225,000 and according to the assessed valuations in 1898, there had been a profit of \$750,000. This land was assessed in 1898 at \$14 per square foot, while land on the next block was assessed for but \$7.50 per foot, thus showing the effect on real estate values of the public expenditure in and about the square.

These reasons had weight with the committee and the Legislature, and resulted in the report of a bill by the committee establishing a ninety-foot limit on three sides of the square, with a one-hundred-foot limit on Boylston Street. The reasons for this difference in height were four:—

*First.* That the ninety-foot limitation applied to the east, south, and west sides, thus giving a larger amount of sunlight to the square, the one-hundred-foot limitation being on the north side where this consideration did not apply.

*Second.* The principal architectural buildings of the square upon which large amounts of money had been expended, to wit, Trinity Church, the Art Museum, and the Public Library, were on these three sides, and these buildings would be the most affected by a building above ninety feet.

*Third.* Consideration was given to the shape of the square, which, owing to its configuration, would allow a

greater height of building on Boylston Street than on the other sides, without injury to its appearance.

*Fourth.* The greater danger on those sides of the square to the public buildings from fire and from loss of light.

These reasons apply to-day with almost as much force as they did in 1898, in spite of the fact that the Art Museum now intends to remove towards the end of the present decade.

The limit of ninety feet fixed by the committee in its report was a compromise between the eighty-foot limitation asked for by the petitioners and the height asked for by the remonstrants. Amendments were offered both on the floor of the House and the Senate, making the limitation ninety-two feet and ninety-six feet, but were defeated. These amendments were offered in the interests of the owners of the Westminster Chambers, and the ninety-six-foot amendment would have permitted the construction as carried out.

After the materials began to be delivered on the ground in January, the construction of the building rapidly proceeded. At about this time, however, the attention of the Park Commissioners of the City of Boston was called to the Act of the Legislature of 1896 (Ch. 313), which limited the height of buildings on a park, or public way on which a park borders, to seventy feet. On January 29 the Boston Park Commission wrote to the trustees of the building, calling their attention to the fact that St. James Avenue bordered on the Copley Square Park, and that their plans contemplated a violation of this seventy-foot law. No attention apparently was paid to this letter, and two months later, on the twenty-ninth day of March, the city of Boston, through its law department, filed a bill in equity in the Supreme Court to restrain the erection of the building beyond the seventy-foot limit. Mr. Pillsbury for the Westminster Chambers appeared, and, to prevent an application to the court for an injunction, agreed orally that pending the final action by the Legislature on the bill before it, the building should not be erected above seventy feet. In spite of this agreement the construction went on, and a number of the steel beams were erected to a height of over one hundred feet. When this was called to the attention of the city, a written stipulation was filed in court in the case,



signed by counsel for the Westminster Chambers, agreeing that the building should not be erected above seventy feet, the agreement being made, as it recites, "to avoid necessity of application for temporary injunction." Thus, at the very beginning of the litigation, the owners of the Westminster Chambers avoided any reference to the courts to determine their rights.

It was now evident that the owners of the building were as desirous of some legislation as to the height of buildings in Copley Square as were the petitioners, and at their instance a section was introduced into the statute exempting Copley Square from the effect of the seventy-foot law.

The act was passed and went into effect May 23, 1898. On this date the steel framework was wholly erected to the height of seven stories, and the masonry walls were completed to a point between the third and fourth stories, all construction above the seventh floor having been suspended in accordance with the stipulation.

The statute made ample provision for damages for all loss to the owners of the Westminster Chambers through the changes in their building caused by the passage of the act after their contracts had been made.

The owners of the building now had to face the problem how to complete their building within the limitation of the statute, and at their request their architect prepared plans showing a building of seven stories, a building of seven stories with a Mansard roof, an eight-story building, and a nine-story building. The owners were desirous of getting as many stories as possible, and finally selected the eight-story plan and submitted it to the Park Commissioners for their approval. This plan necessitated a construction to the height of ninety-six feet. It soon became rumored that a violation of the law was intended, and on the fourteenth day of June, 1898, the Art Museum employed Mr. Samuel J. Elder to prevent this violation, and he at once notified the Attorney-General of such employment. No legal steps could be taken, however, until there was some evidence of this intention, and on the second day of July, 1898, Messrs. Woodbury & Leighton informed President Crafts of the Institute of Technology of their intention to build to ninety-six feet.

Application was at once made to the Attorney-General to permit the use of his name in legal proceedings to prevent this violation, and the Attorney-General set a hearing on this question at the earliest possible moment, which was July 5, when the information was presented to him. Mr. Pillsbury appeared at this hearing in opposition, and desired a postponement, which the Attorney-General was willing to grant on condition that Mr. Pillsbury would agree that in the meantime there should be no violation of law. At the postponed hearing on July 7, Mr. Pillsbury would not deny that his clients were intending to build above the ninety-foot limit, but claimed that the statute was unconstitutional, and made the further point that the Attorney-General, in his official capacity as representing the general public, had no right to bring the matter before the court, but that the law gave the city of Boston the sole right to secure its enforcement. The hearing was further adjourned to July 26, to allow a consideration of these questions.

In the meantime, as has been said, the ninety-six-foot plans had been submitted to the Park Commissioners for their approval, and by them had been submitted to Prof. F. W. Chandler, the consulting architect of the city. On July 14, Professor Chandler reported that the plans contemplated a violation of law by the addition of six feet of construction above the limit of the statute, and submitted a sketch showing how the building could be erected within the ninety-foot limit, but retain only seven stories, and on the 16th of July the plans were returned by the Park Commissioners to Woodbury & Leighton with a letter enclosing Professor Chandler's sketch, and stating that the plans were returned *without approval*.

Messrs. Woodbury & Leighton were extremely anxious to secure an approval of these plans, and not only called upon Professor Chandler himself, but called upon the Art Museum on July 16 to induce them, if possible, to withdraw their objection and abandon the legal proceedings they were contemplating. They were unsuccessful in all their attempts, and it is important to bear this in mind in view of the claim which has been so persistently made, that the builders went forward relying on the consent of the Park Commissioners.



and without knowledge that there was objection. The contrary is the fact. They did know that their plans were not approved, and that the Art Museum was actively engaged in endeavoring to prevent their intended violation of law.

In the meantime, also, on the 9th of July, counsel for the Art Museum had made a written demand upon the city to take legal steps to prevent the proposed violation of law, and on July 25, the day before the postponed hearing before the Attorney-General, the city filed such a bill asking for an injunction against the builders from going above ninety feet. The Attorney-General, when this proceeding was called to his attention, stated that he could not assume that this bill was not filed in good faith, or that the city would not act, and under the circumstances declined to take any action until it should be seen what steps the city proposed to take. The construction of the building was forthwith resumed, and rapidly pressed forward to the height of ninety-six feet, which was reached about the middle of August.

On the 12th of August Professor Chandler wrote a protest to Mr. Pillsbury, and received a reply that he probably did not understand the law.

On the 18th of August Professor Chandler met Mr. Woodbury and called his attention to the violation of law, and was told by Mr. Woodbury, "The building is there, and by G—d it is going to stay there." It is fair to Mr. Woodbury to say that he denies this vehemence of language, but Professor Chandler is authority for the statement, and Mr. Woodbury would hardly deny that if he did not use these words he had the intention implied in them. No action whatever was taken by the city under its bill in equity, and it subsequently appeared that it had agreed with the Westminster Chambers that it would not press the proceedings. When the Attorney-General returned from his vacation a new application was made to him, which was immediately granted, and the information in his name, at the relation of the Museum of Fine Arts, was filed in court September 17, 1898.

At this time the exterior construction of the building was wholly completed, and substantially the whole portion above the ninety-foot line had been constructed after the passage of the statute. The suit then stood for hearing, but after

the building had been completed, the Park Commissioners were asked to view the building, and on the last day of October, 1898, passed a vote approving, "The sculptured ornaments erected on the building."

This approval of the sculptured ornaments was claimed by Mr. Pillsbury to be an authorization of that portion of the building behind the ornaments, and this claim was at once set up in court in the suits which had been brought.

At the hearings Mr. Pillsbury claimed: —

*First.* That the statute was unconstitutional.

*Second.* That the Attorney-General as representing the public had no right to interfere, as the sole right to enforce the right lay with the City of Boston.

*Third.* That this approval by the Park Commission, after the completion of the building, rendered it legal.

The city Law Department appeared in court, and stated that they did not intend to press their bill, and were content to leave the building as it stood.

On February 28, 1899, the owners and contractors began their suit against the City of Boston for damages under the statute, and they have stated in court that their claim amounts to \$300,000. This case has never been brought forward for trial, although it might have been tried months ago.

During the spring of 1899 application was made to the Legislature by the owners to change the law so as to legalize the building, but as the matter was pending in the courts the bill was referred to the next General Court. In October of 1899 the Supreme Court decided that the statute was constitutional, that the Attorney-General had the right to institute proceedings for the enforcement of the statute, and that the approval by the Park Commissioners of the sculptured ornaments on the building could not in any way legalize the offending six feet of building behind them.

After this decision the Art Museum withdrew from the case, which then proceeded in the name of the Attorney-General alone, who stated that if the present counsel should give up the case he should feel called upon to prosecute it himself.

When the case came on for a further hearing in the spring, the court, at the request of the owners, postponed the case

until the Legislature should act upon the bill which had been referred to it the year before. This bill passed both houses, but was vetoed by Governor Crane, on the ground that he was "*unable to give his sanction to a measure intended to relieve citizens of the Commonwealth from the consequences of deliberate disregard of the provisions of a statute of the General Court.*" In March, 1901, the Supreme Court of Massachusetts ordered that the offending portion of the building be removed by October 1, and the full court indicated their view of the gravity of the situation by taking the unusual step of immediately framing the decree themselves, instead of sending it to a single justice for that purpose.

The Legislature in 1901, after extended hearings, gave the petitioners leave to withdraw, and Mayor Hart, who had petitioned for a change in the law, did not appear in favor of his petition after he had given a hearing on the matter. The owners of the building took a writ of error to the Supreme Court of the United States, and in 1902 Mayor Collins presented a petition to the Legislature to the same effect as the petitions of previous years. On the day of the hearing Mr. Bailey appeared and stated that in view of the state of public opinion on the matter, the Mayor did not desire to press his bill, and the petitioner was given leave to withdraw. During this year also, the new Attorney-General, Mr. Herbert Parker, came into the case in place of Mr. Knowlton, whose term had expired. The case was argued in Washington in December of 1902, and the appeal was dismissed by that court in February, 1903, so that the litigation in the case is now at an end.

It has been claimed at these hearings in behalf of the petitioners that the owners and contractors went forward and completed the building in good faith in accordance with an understanding with the city. There were conferences between representatives of the building and of the city in which the method of completion of the building was discussed. The owners desired to get as high a building as possible, and the city desired to pay as small damages as possible. Exactly what the trade between the two was has never been stated, but there was apparently a combined attempt to evade the plain terms of the law, and it was thought by both the coun-



sel for the building and the Law Department of the City that this could be done if the Attorney-General could be prevented from bringing a suit, and the city should bring a suit and then refuse to press it. At any rate, this was what was done, and the owners and contractors resisted and delayed in every way the application by the Attorney-General to the court. The owners deliberately and wilfully took their chances at preventing the public, through the Attorney-General, from interfering with them, relying on the understanding with the city that it would not make any attempt to enforce the law. This is the extent of the agreement with the city, of which they have said so much.

It is evident that the financial difficulties of Woodbury & Leighton were due to the fact that they were unable to sell the trust stock which they accepted in payment of their contracts, and it is further evident that this inability to sell the stock has been due to the litigation which they have persisted in all these years. Now that the rights of the parties have been finally determined by the courts, there is no longer any uncertainty to affect the value of the stock. When this stock is sold and when the suit against the city is determined, Woodbury & Leighton will hardly claim that they have suffered any loss. The figures show that there was to be paid in cash to the Philadelphia concern and to the architect \$146,300. There has been received from the mortgages, over what was paid the owners, and from sales of stock, \$406,600, so that the balance in cash to Woodbury & Leighton after paying the Philadelphia concern and the architect has amounted to \$260,300. Their contract was \$398,700, and the balance unpaid to them amounts to \$138,400. As against this, they have left 2,169 shares of stock, which if sold at par will give them a profit of \$74,500, and in addition they have their suit against the City of Boston, in which they estimate the damages to be \$300,000. It is difficult to see where any great loss to them comes in if their estimate is correct.

This estimate may be a little high, as in the suits that have been tried by the owners on Boylston Street, the juries have awarded no damages at all except for the corner lots. The owners of "The Bristol" recovered only \$15,000, and the

owner at the corner of Dartmouth Street got \$17,000, which was more than his entire property had cost him.

A new element has come into the case this year through the appearance of the new owners of the Art Museum property, who are asking for the increase of the limitation in height on their property from ninety to one hundred feet. The Art Museum allowed the three-years limit to pass without bringing any suit against the City of Boston for any damage caused by the statute, and sold their property subject to the ninety-foot limitation. The purchasers are now asking the State to make them a gift of this extra ten feet, thereby rendering their property much more valuable to them. They agreed to pay the Art Museum \$1,800,000, but they have issued, and are endeavoring to sell to the public, \$2,000,000 of trust stock, thus injecting into their enterprise \$200,000 of water, and of this \$30,000 goes to the promoter of the enterprise, and \$40,000 to the underwriters, who are eight firms of stock brokers on State Street and in the immediate vicinity. The stock was offered to the public last May, through a Wall Street firm of stockbrokers, who succeeded in selling but a portion of it. The stock can now be bought below par (at 97), and it is evident that this real estate speculation will be materially assisted if the Legislature will come to its aid by the passage of this bill.

These, gentlemen, are the facts in this case, and it must be evident, when they are understood, that there is not now, and never has been, any proper ground for the repeal, or amendment, of the law of 1898.





